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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Hector Raul Ortiz-Tarazon, Sr.,
9 Movant/Defendant
10 -vs-
11 United States of America,
12 Respondent/Plaintiff.

CV-16-0073-PHX-JAT (JFM)
CR-12-0877-PHX-JAT

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14 **Report & Recommendation**
15 **on Motion to Vacate, Set Aside or**
16 **Correct Sentence**

17 **I. MATTER UNDER CONSIDERATION**

18 Movant, following his conviction in the United States District Court for the
19 District of Arizona, filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to
20 28 U.S.C. § 2255 on January 11, 2016 (Doc. 1). On June 17, 2016 Respondent filed its
21 Response (Doc. 6). Movant filed a Reply on July 8, 2016 (Doc. 7).

22 The Movant's Motion is now ripe for consideration. Accordingly, the
23 undersigned makes the following proposed findings of fact, report, and recommendation
24 pursuant to Rule 10, Rules Governing Section 2255 Cases , Rule 72(b), Federal Rules of
25 Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

26 **II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND**

27 **A. FACTUAL BACKGROUND**

28 According to the statement of factual basis in Movant's written Plea Agreement,
between December 1, 2008, and May 21, 2012, Movant and his son Hector Francisco
Ortiz, Jr. (hereafter, "HJR") ran a drug trafficking organization (DTO) that shipped
marijuana to the Midwest and east coast. They received cash and money orders from
marijuana customers as payment for the marijuana. Movant and HJR also discussed
trading vehicles and weapons for drugs, including volumes and exchange rates.

Movant and HJR entered into agreements with a Confidential Source (CS) to launder the DTO's drug trafficking proceeds, exchanging blank money orders (drug proceeds) for the DTO in exchange for cash.

HJR possessed a gun during these money exchanges with the CS to protect the drug proceeds in furtherance of the defendants' drug trafficking activities. Moreover, Movant told the CS that HJR was in possession of at least 200 guns and armor piercing bullets. Movant knew HJR possessed firearms to protect marijuana stored at HJR's house in furtherance of the defendants' drug trafficking activities.

In April, 2012, Movant met a marijuana load vehicle driven by a co-defendant. The load vehicle was intercepted in a traffic stop and contained 95 pounds of marijuana.

In May, 2012, law enforcement executed search and seizure warrants at numerous locations, including at the residences of Movant and HJR. At Movant's house they found numerous weapons and ammunition throughout the residence, marijuana wrapping material, and brass knuckles in one of HSR's vehicles. A search of HJR's house found numerous weapons and ammunition, 132 pounds of marijuana, including a boxed up bale of marijuana in a vehicle with a pistol in the glove box, which was the one described by Movant to the CS. Other related search warrants yielded additional weapons, and blank money orders. Movant and others had purchased packaging and wrapping materials to conceal the marijuana and mask the odor so the marijuana could be transported discreetly to customers in other states, airline flights, car rentals, hotels, cellular telephones and other expenses in order to facilitate drug transactions, the transportation of marijuana and marijuana proceeds. (Exhibit A, Plea Agreement at 10-18.) (Exhibits to the Response, Doc. 6, are referenced herein as "Exhibit _____.")

B. PROCEEDINGS AT TRIAL

On April 26, 2012, Movant was indicted, in an Indictment naming nine co-defendants, on seven counts, including:

1. one count of conspiracy to possess marijuana with intent to distribute (Count

1 1);

2 2. three counts of possession of marijuana with intent to distribute, under 21

3 U.S.C. § 841(b)(1)(D) (Counts 2, 6, and 9);

4 3. one count of possession of marijuana with intent to distribute, under 21 U.S.C.

5 § 841(b)(1)(C) (Count 8);

6 4. one count of conspiracy to commit money laundering (Count 10); and

7 5. one count of promotion and concealment of money laundering (Count 25).

8 (Indictment, CR Doc. 3.) (Filings in the underlying criminal case, CR-12-0877-PHX-
9 JAT, are referenced herein as “CR Doc. ____.”) The Indictment also sought a money
10 judgment of \$1 million, and forfeiture of a home, and 10 vehicles. (*Id.* at 14, *et seq.*)

Movant was appointed counsel, but eventually moved to substitute retained counsel Fischer. (CR Doc. 109, Motion; CR Doc. 114, Order 8/8/12.)

13 Though originally set for December 4, 2012, the case was eventually designated a
14 complex case, and on October 21, 2012, was set for trial on January 14, 2014. (CR Doc.
15 146, M.E. 10/31/12.)

On April 9, 2013, a First Superseding Indictment was issued, charging Movant with fifteen counts, consisting of the original seven and the following eight new counts:

25 (1st Superseding Indictment, CR Doc. 201.)

On June 26, 2013, attorney Morgan entered an appearance as counsel for Movant in association with attorney Fischer. (CR Doc. 277.)

28 Counsel filed motions to sever (CR Doc. 315) and to suppress wiretaps (CR Doc.

1 317). As a result of Movant's eventual guilty plea, no ruling on these motions was
2 made.

3 On November 19, 2013, a Second Superseding Indictment was issued, seeking
4 forfeiture of additional assets, including some 43 sets of firearms and related accessories
5 and ammunition. (2nd Superseding Indictment, CR Doc. 396.)

6 On December 13, 2013, Movant entered into a written Plea Agreement (Exhibit
7 A), in which he agreed to plead guilty to

- 8 1. one count of conspiracy to possess marijuana with intent to distribute (Count
9 1);
- 10 2. one count of conspiracy to commit money laundering (Count 10); and
- 11 3. one count of use of a firearm in committing a drug trafficking crime (Count
12 26).

13 (*Id.* at 1.) In addition, Movant agreed to the forfeiture of some \$212,000, and various
14 weapons and vehicles. (*Id.* at 5-9.) In exchange, the Government made a conditional
15 agreement to recommend a reduction in sentencing for acceptance of responsibility. (*Id.*
16 at 3.) In addition, the remaining counts would be dismissed. (*Id.*) The Plea Agreement
17 included, among others, the following express waiver:

18 The defendant waives (1) any and all motions, defenses, probable
19 cause determinations, and objections that the defendant could assert
20 to the indictment or information; and (2) any right to file an appeal,
any collateral attack, and any other writ or motion that challenges
21 the conviction, an order of restitution or forfeiture, the entry of
judgment against the defendant, or any aspect of the defendant's
22 sentence, including the manner in which the sentence is determined,
including but not limited to any appeals under 18 U.S.C. § 3742
(sentencing appeals) and motions under 28 U.S.C. §§ 2241 and
23 2255 (habeas petitions), and any right to file a motion for
modification of sentence, including under Title 18 U.S.C. § 3582(c).
This waiver shall result in the dismissal of any appeal, collateral
attack, or other motion the defendant might file challenging the
conviction, order of restitution or forfeiture, or sentence in this case.
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26 (*Id.* at 4.)

27 On December 13, 2013, Movant appeared before Magistrate Judge Logan and
28 entered a plea of guilty pursuant to the Plea Agreement. (CR Doc. 529, M.E. 12/13/13.)

1 On January 6, 2014, the recommendation to accept the plea was accepted and sentencing
 2 set. (CR Doc. 558, Order 1/6/14.)

3 Movant filed Objections (CR Doc. 658) to the pre-sentence investigation, which
 4 were overruled, and after a number of continuances, on June 11, 2014, Movant was
 5 sentenced to concurrent terms of 120 months on Counts 1 and 10, and a consecutive term
 6 of 60 months on Count 26, for an effective 15 year sentence. (CR Doc. 708, M.E.
 7 6/11/14; CR Doc. 721, Judgment.)

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9 **C. PROCEEDINGS ON DIRECT APPEAL**

10 Movant file a Notice of Appeal (CR Doc. 738) and appellate counsel was
 11 appointed (CR Doc. 822, Order 10/15/14). Counsel found no issue for review, and filed
 12 a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). Movant filed a *pro se*
 13 supplemental brief. The Ninth Circuit concluded that Movant made a valid waiver of his
 14 right to appeal his conviction and sentence, and dismissed the appeal. (CR Doc. 907,
 15 Mem. Dec. at 1-2. Also attached to Respondent's Supplemental Answer, Doc. 10 at
 16 Exhibit B.)

17 **D. PROCEEDINGS ON PRESENT MOTION TO VACATE**

18 **Motion to Vacate** – Movant commenced the current case by filing his Motion to
 19 Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 on January 11, 2016
 20 (Doc. 1). Movant's Motion asserts the following four grounds for relief:

21 In **Ground One**, he alleges that he received the **ineffective assistance of counsel during plea negotiations** when counsel
 22 failed to object to the Court's Rule 11(b)(1) and (3) acceptance of Movant's guilty plea to the § 924(c) offense absent any factual
 23 basis. In **Ground Two**, Movant alleges that counsel rendered **ineffective assistance by failing to object to his sentence** on the §
 24 924(c) count absent any factual basis. In **Ground Three**, Movant alleges that **appellate counsel rendered ineffective assistance** of
 25 counsel by failing to raise the Court's violation of Rule 11(B)(1) and (3) by accepting Movant's guilty plea to the § 924(c) charge. In
 26 **Ground Four**, Movant alleges that counsel rendered **ineffective assistance by failing advise Movant not to plead guilty** to the §
 27 924(c) charge.

1 (Order 2/19/16, Doc. 3 (emphasis added).)

2 **Response** - On June 17, 2016 Respondent filed its Response ("Answer") (Doc. 6).
3 Respondent argues that Movant's claims are procedurally defaulted, waived by Movant's
4 plea and Plea Agreement, and are without merit.

5 **Reply** - On July 8, 2016 Movant filed a Reply (Doc. 7). Movant argues that the
6 indictment was defective, his waiver was unenforceable, the Court violated Rule 11, and
7 he has not procedurally defaulted on his claims.

8 **Supplemental Response** – On August 3, 2016, the Court noted that the Response
9 did not raise a claim of procedural default, and that Respondent had not had an
10 opportunity to be heard on Movant's assertion that trial counsel had a conflict of interest
11 in negotiating the plea agreement and associated waiver because it waived claims of
12 counsel's own ineffectiveness.

13 On August 24, 2016, Respondent filed its Supplemental Response (Doc. 10),
14 arguing: (1) Movant's waiver did not bar him from raising claims of ineffective
15 assistance, and Respondent so concedes; (2 and 3) the waiver of claims of ineffective
16 assistance was not deficient performance under prevailing standards at the time; and (4)
17 any conflict was merely theoretical. Respondent argues in a footnote that direct claims
18 of ineffective assistance are procedurally defaulted because not raised on appeal, and
19 claims directly based on the absence of a factual basis were addressed on appeal and are
20 not reviewable in this court.

21 **Supplemental Reply** – On September 19, 2016, Movant filed his Supplemental
22 Reply (Doc. 11). Movant argues: (1) Respondent has conceded he has the right to bring
23 the instant motion, requiring consideration of his claims of ineffective assistance under
24 *Strickland*; (2) the Ninth Circuit did not address on the merits his claim on the absence of
25 a factual basis, and thus the issue remains reviewable; (3) Respondent fails to address the
26 merits of the factual basis claim.

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III. APPLICATION OF LAW TO FACTS

A. PROCEDURAL DEFAULT

Respondent argues that Movant has procedurally defaulted “several sub-claims under each ‘Ground’ for relief,” and that such “sub-claims are procedurally defaulted because he could have raised them on direct appeal.” (Response, Doc. 6 at 6 and n.3.)

The Court has neither discerned such sub-claims, nor directed a response to them. Rather, the Court has only discerned and directed responses to claims of ineffective assistance of trial and appellate counsel. (Order 2/19/16, Doc. 3.)

Similarly, Movant’s Traverse makes clear that the only claims he intends to bring are claims of ineffective assistance of counsel. (Travers, Doc. 7 at 8.)

The general rule is “that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice.” *Massaro v. U.S.*, 538 U.S. 500, 504 (2003). Thus, a Section 2255 movant raising a claim for the first time in post-conviction proceedings is in procedural default, and is precluded from asserting the claim. *Bousley v. U.S.*, 523 U.S. 614, 621 (1998) (finding default where petitioner challenging his guilty plea did not raise claim in direct appeal); *United States v. Frady*, 456 U.S. 152, 165 (1982) (noting that a motion to vacate or modify a sentence under 28 U.S.C. § 2255 cannot be used as a substitute for a direct appeal).

However, in a federal prosecution, claims of ineffective assistance of counsel need not be exhausted on direct appeal, but are properly brought in the first instance in a Motion pursuant to 28 U.S.C. sec. 2255. "We do hold that failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro*, 538 U.S. at 509.

Because each of Movant’s claims are based upon ineffective assistance of counsel, they are not procedurally defaulted.

B. RES JUDICATA/LAW OF THE CASE

Respondent argues: “to the extent Defendant’s ineffective assistance claim is actually an attempt to obtain a ruling in his favor on the substantive issue that the lower

1 court violated Rule 11 by failing to establish a factual basis for Defendant's guilty plea
 2 to the § 924(c) offense, the Ninth Circuit has already considered this claim and ruled
 3 against Defendant on the merits." (Supp. Resp., Doc. 10 at 3, n.1.)

4 Ordinarily, the doctrines of res judicata and collateral estoppel do not apply to
 5 habeas corpus proceedings. *Sanders v. U.S.*, 373 U.S. 1, 8 (1963). However, the law of
 6 the case doctrine is applicable on federal habeas review. *Shore v. Warden*, 942 F.2d
 7 1117, 1123 (7th Cir. 1991). "The law of the case doctrine ordinarily precludes a court
 8 from re-examining an issue previously decided by the same court, or a higher appellate
 9 court, in the same case." *U.S. v. Caterino*, 29 F.3d 1390, 1395 (9th Cir. 1994) (quoting
 10 *U.S. v. Maybushier*, 735 F.2d 366, 370 (9th Cir. 1984)). Under this doctrine, a district
 11 court will ordinarily refrain from acting if an appellate court previously has issued a
 12 decision on the merits of the claim. *Caterino*, 29 F.3d at 1395. Thus, the Ninth Circuit
 13 has long held that "[i]ssues disposed of on a previous direct appeal are not reviewable in
 14 a subsequent petition under 2255." *Stein v. U.S.*, 390 F.2d 625, 626 (9th Cir. 1968).

15 Movant argued to the Ninth Circuit that his waiver was invalid because the plea
 16 colloquy was a violation of Rule 11 due to the trial court's failure to establish a factual
 17 basis for the plea on the use of a firearm under 18 U.S.C. § 924(c). (Supp. Resp., Doc.
 18 10, Exhibit A, Supp. Opening Brief at 3-4.) In resolving Movant's direct appeal, the
 19 Ninth Circuit opined:

20 Ortiz-Tarazon has waived his right to appeal his conviction and
 21 sentence. Because the record discloses no arguable issue as to the
 22 validity of the appeal waiver, we dismiss the appeal. *See United*
States v. Watson, 582 F.3d 974, 986-88 (9th Cir. 2009).

23 (CR Doc. 907, Mem. Dec. at 2.)

24 Movant now argues in his Supplemental Reply that the issue of a factual basis
 25 was not reached in the Ninth Circuit's decision because they relied upon the waiver.
 26 (Supp. Reply, Doc. 11 at 4.) However, the longstanding law of the Ninth Circuit is that a
 27 waiver is invalid if Rule 11 is not complied with. "An appeal waiver will not apply if: 1)
 28 a defendant's guilty plea failed to comply with Fed.R.Crim.P. 11; 2) the sentencing judge

1 informs a defendant that she retains the right to appeal; 3) the sentence does not comport
 2 with the terms of the plea agreement; or 4) the sentence violates the law.” *United States*
 3 *v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). As argued by Movant, Rule 11(b)(3)
 4 requires a factual basis. Thus, the waiver could be enforced only if there was a sufficient
 5 factual basis to support the charge.

6 In light of Movant’s explicit argument to the Ninth Circuit that Rule 11’s factual
 7 basis requirement had not been met, the finding that there was no arguable issue as to the
 8 validity of the waiver was an implicit rejection of the Rule 11 argument. “[T]he law of
 9 the case would preclude the district court from reconsidering only issues decided
 10 explicitly or by necessary implication in this court’s previous disposition.” *Liberty Mut.*
 11 *Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 441 (9th Cir. 1982). “The decision of an issue need
 12 not be express to establish the law of the case. Implicit decision suffices, and a terse
 13 decision is even more clearly the law of the case because it does not require a
 14 determination whether actual decision can be inferred.” 18B Wright & Miller, Fed. Prac.
 15 & Proc. Juris. § 4478 (2d ed. 2016). “If the analysis used to dispose of an issue before
 16 the court controls disposition of an issue that was not considered, however, the law of the
 17 case established by the analysis may control disposition of the new issue.” *Id.*

18 Thus, the Ninth Circuit has established as the law of this case that the trial court
 19 did not fail to establish a factual basis for the plea. Moreover, because any claim of
 20 ineffective assistance of counsel related to the factual basis would require a finding that
 21 there was no factual basis finding, the Ninth Circuit’s decision also precludes the related
 22 claim of ineffective assistance. Thus, this Court is precluded by the law of the case from
 23 considering each of Movant’s grounds for relief.

24 In Ground One, Movant argues that he received ineffective assistance of trial
 25 counsel based on lack of factual basis on the § 924(c) charge. “The failure to raise a
 26 meritless legal argument does not constitute ineffective assistance of counsel.” *Baumann*
 27 *v. United States*, 692 F.2d 565, 572 (9th Cir. 1982). Therefore, to find such
 28 ineffectiveness, this Court would have to reject the Ninth Circuit’s determination that

1 there was a sufficient factual basis. The law of the case precludes such a rejection.

2 Similarly, in Ground Two, Movant argues that he received ineffective assistance
3 of trial counsel at sentencing based on the lack of factual basis on § 924(c). Again, this
4 would require rejection of the Ninth Circuit's decision.

5 In Ground Three, Movant argues that appellate counsel was ineffective for failing
6 to challenge the lack of factual basis on § 924(c). This claim similarly cannot be
7 reached.

8 A finally, in Ground Four, Movant argues that trial counsel was ineffective for
9 advising him to plead guilty in light of the lack of a factual basis for the § 924(c) charge.
10 Movant does not assert that the facts stated in the factual basis did not exist, merely that
11 they did not rise to a violation of § 924(c). Again, this claim would require this Court to
12 reject the Ninth Circuit's determination that the factual basis established a violation of
13 924(c).

14 Accordingly, all of Petitioner's claims are founded upon an argument that the
15 Ninth Circuit has rejected, and which the law of the case precludes this Court from
16 revisiting. Accordingly, the Motion must be denied.

17 **C. OTHER DEFENSES**

18 In light of the determination that consideration of Movant's claims is precluded
19 from consideration under the law of the case, the undersigned does not reach Movant's
20 defenses based on the waiver of rights to bring the instant motion, or Movant's retort that
21 the plea and waiver were not knowingly entered because of the ineffectiveness raised in
22 the grounds for relief or because of the purported conflict of interest in advising Movant
23 to make a waiver of claims of ineffective assistance.

25 **IV. CERTIFICATE OF APPEALABILITY**

26 **Ruling Required** - Rule 11(a), Rules Governing Section 2255 Cases, requires
27 that in habeas cases the "district court must issue or deny a certificate of appealability

1 when it enters a final order adverse to the applicant.” Such certificates are required in
 2 cases concerning detention arising “out of process issued by a State court”, or in a
 3 proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28
 4 U.S.C. § 2253(c)(1).

5 Here, the Motion to Vacate is brought pursuant to 28 U.S.C. § 2255, and
 6 challenges Movant’s federal criminal judgment or sentence. The recommendations if
 7 accepted will result in Movant’s Motion being resolved adversely to Movant.
 8 Accordingly, a decision on a certificate of appealability is required.

9 **Applicable Standards** - The standard for issuing a certificate of appealability
 10 (“COA”) is whether the applicant has “made a substantial showing of the denial of a
 11 constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district court has rejected the
 12 constitutional claims on the merits, the showing required to satisfy § 2253(c) is
 13 straightforward: The petitioner must demonstrate that reasonable jurists would find the
 14 district court’s assessment of the constitutional claims debatable or wrong.” *Slack v.*
 15 *McDaniel*, 529 U.S. 473, 484 (2000). “When the district court denies a habeas petition
 16 on procedural grounds without reaching the prisoner’s underlying constitutional claim, a
 17 COA should issue when the prisoner shows, at least, that jurists of reason would find it
 18 debatable whether the petition states a valid claim of the denial of a constitutional right
 19 and that jurists of reason would find it debatable whether the district court was correct in
 20 its procedural ruling.” *Id.*

21 **Standard Not Met** - Assuming the recommendations herein are followed in the
 22 district court’s judgment, that decision will be in part on procedural grounds, and in part
 23 on the merits in light of the law of the case. Under the reasoning set forth herein, jurists
 24 of reason would not find it debatable whether the district court was correct in its
 25 procedural ruling, and jurists of reason would not find the district court’s assessment of
 26 the constitutional claims debatable or wrong.

27 Accordingly, to the extent that the Court adopts this Report & Recommendation
 28 as to the Motion to Vacate, a certificate of appealability should be denied.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, filed January 11, 2016 (Doc. 1) be **DENIED**.

IT IS FURTHER RECOMMENDED that, to the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

VI. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also Rule 10, Rules Governing Section 2255 Proceedings.* Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated: November 29, 2016

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James F. Metcalf
United States Magistrate Judge